Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1219

DAVID E. MORRILL,

Appellant,

v.

WILLIAM J. JANKLOW, GOVERNOR
STATE OF SOUTH DAKOTA

Appellee.

ON APPEAL FROM THE

SUPREME COURT OF SOUTH DAKOTA

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16, this Motion to Dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of South Dakota is filed on behalf of the Governor of South Dakota.

The appeal presents no substantial federal question. The qualifications for eligibility to serve on the South Dakota Board of Regents which the South Dakota Supreme Court has here sustained are well within the framework of permissible state regulation which this

Court has previously upheld in cases coming from other states. Appellant's contention that the challenged portion of the statute in question establishes an arbitrary classification between South Dakota citizens is without basis in fact. Accordingly, plenary consideration of the case by this Court is not warranted.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE.

A.

THE STATUTE

The appeal raises the question of the validity of SDCL 13-49-2 of the South Dakota Codified Laws.

This statute provides in relevant part that members of the governing board for all state educational institutions who are regular members shall be persons of probity and wisdom and selected from among the best known citizens, residents of different portions of the state, none of whom shall reside in the county in which any state educational institution is located, all of whom shall not be members of the same political party.

B.

THE PROCEEDINGS BELOW

The Appellant was appointed to serve as a member of the State Board of Regents on January 30, 1975. At the time of his appointment he was a Meade County resident. In August, 1978, Appellant

moved to Pennington County wherein a state institution under the jurisdiction of the Board of Regents is located. Appellant filed an application for a Writ of Prohibition in anticipation of the Appellee's declaration pursuant to SDCL 13-49-2 that a vacancy on the state board existed and needed to be filled. The Appellee answered the application for Writ of Prohibition and counterclaimed for a Writ of Quo Warranto challenging Appellant's right to hold office.

In an original proceeding before the South Dakota Supreme Court, jurisdiction over Appellant's application for Writ of Prohibition was declined while the South Dakota Supreme Court exercised jurisdiction over the counterclaim for a Writ of Quo Warranto. The South Dakota Supreme Court, holding that SDCL 13-49-2 does not violate the equal protection of the law guarantees prescribed in the Fourteenth Amendment of the United States Constitution or Article VI, § 18 of the South Dakota Consitution, declared that a vacancy existed on the South Dakota Board of Regents.

II.

ARGUMENT

THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WARRANTING REVIEW BY THIS COURT.

The United States Supreme Court has held that the Fourteenth Amendment to the United States Constitution permits the States a wide scope of discretion in enacting laws which affect some groups of citizens

differently than others. McGowan V. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

The statutory classification in question is based on residency in counties containing state educational institutions, i.e., individuals residing in such counties may not serve on the South Dakota Board of Regents. Appellant contends that this classification violates his Equal Protection rights under the Federal Constitution. Appellant further contends that, applying the traditional equal protection test, the classification established by SDCL 13-49-2 is an arbitrary one without a rational basis to a legitimate state objective.

At best, sitting on the Board of Regents is a privilege granted by the Legislature and could not be deemed to be a fundamental right rooted in the Constitution. Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). The test of strict judicial scrutiny is reserved for cases involving laws which operate to disadvantage suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); Rehearing denied, 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418. Therefore, use of traditional equal protection analysis is mandated.

Under traditional equal protection analysis, a mere classification by itself is not enough to establish a violation of the Equal Protection Clause of the 14th Amendment. Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). A legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. United States Department of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. McGowan v. Maryland, supra. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A state statute should not be set aside if any state of facts reasonably can be conceived to justify it. McGowan v. Maryland, supra. Statutes should be construed whenever possible so as to uphold their constitutionality. United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971).

The legislative purpose or objective for the residency requirement in SDCL 13-49-2 has been debated frequently and extensively in the State Legislature in the past years. The main purpose of imposing residency requirements is to maintain the objectivity and integrity of the Board. If appointees to the Board of Regents could reside in

counties containing state educational institutions, considerable political pressure would be brought to bear on the Governor to have each county containing an educational institution represented. The statute in question further attempts to insulate the Board to the extent possible from localized pressures by preventing the appointment of institutional representatives and by protecting against overzealous appointees becoming champions of institutions located in the counties from which they are appointed. The statute also minimizes the temptation that would exist for a regent in an institutional county to become involved in the daily administrative functions of the institution.

The Appellant argues that the use of county lines by the legislature to accomplish its legislative purpose is totally arbitrary. Under the traditional equal protection rational-basis standard, this Court has held that perfection in making the necessary classification is neither possible nor necessary. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). That the State Legislature chooses not to determine a more precise method of obtaining an objective Board is not to say that the objective of preserving the objectivity and integrity of the Board is not rationally furthered by the requirements found in SDCL 13-49-2. It is only to say that with regard to the interest of all concerned, the State has perhaps not chosen the best means to accomplish this purpose. But

where rationality is the test, a state does not violate the Equal Protection Clause merely because the classification made by its law is imperfect.

The fact is that the South Dakota statute involved contains a classification which is rationally related to a legitimate legislative objective. The appeal, therefore, presents no substantial federal question warranting plenary review by this Court.

III.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the appeal should be dismissed or in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of South Dakota.

Respectfully submitted,

MARK V. MEIERHENRY
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

Service of the Motion to Dismiss or Affirm was made this 20th day of April, 1979, by depositing same in a United States mailbox, with first class postage prepaid, addressed to Mr. Bruce A. Hubbard, Post Office Box 580, Sturgis, South Dakota 57785.

In addition, I hereby certify that all parties required to be served have been served.

Dated this 20th day of April, 1979.

MARK V. MEIERHENRY
ATTORNEY GENERAL

State of South Dakota